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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, et al.,

Appellants,

v.

BEVERLY MORRIS, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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APPENDIX TO JURISDICTIONAL STATEMENT
TWO VOLUMES
VOLUME II PP. 119-241

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RELEVANT PROVISIONS OF THE NEW YORK CITY CHARTER PERTAINING TO THE POWERS AND DUTIES OF THE N.Y.C. BOARD OF ESTIMATE 230

MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK,
Dated August 21, 1984
81 CV 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

-against-

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

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NEAHER, District Judge.

In December 1981, plaintiffs filed suit charging that the New York City Board of Estimate ("Board") deprived them of equal protection under the fourteenth amendment to the United States Constitution. More

precisely, as Brooklyn residents, plaintiffs maintained that sections 61 and 62 of the New York City Charter, outlining the Board's legislative plan, devalued their ballots by violating the one person, one vote rule. See 1 New York City Charter & Ad. Code Ann. §§61-62 (Williams Press 1976 & Supp. 1982-83).

In December 1982, however, the court held that the Board was not subject to that constitutional principle. The court, as a consequence, granted summary judgment to defendants -- the Board and its members ("city defendants") -- as well as to intervenor-defendant Frank V. Ponterio, a Staten Island resident. Morris v. Board of Estimate, 551 F. Supp. 652, 657 (E.D.N.Y. 1982).

In May 1983, the Second Circuit reversed.

> "[W]e conclude that the Board . . . is selected by popular election and performs general governmental functions. The principle of one person, one vote is therefore applicable."

Morris v. Board of Estimate, 707 F2d 686, 690 (2d Cir. 1983). The Second Circuit, furthermore, remanded with instructions:

> "[T]he district court must determine the degree of malapportionment present (after deciding on the appropriate methodology for doing so) and rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula."

Id. (footnote omitted).

On return, plaintiffs moved for summary judgment; but, after conferring with the court, the parties stipulated that the proceedings should be bifurcated. In the first stage, the most suitable mathematical measure would be identified and superimposed over the Board's electoral scheme to ascertain the malapportionment. If

more than a minor deviation were disclosed, the Supreme Court approved policies and interests served by the Board would be discerned in the second stage to settle the variance's acceptability.[1]

In accordance with that agreed course, the court has reviewed the submissions, the record and the law. Based on that examination, the court holds, as to the first stage issues, that the Supreme Court's methodology in Abate v. Mundt, 403 U.S. 182, 184 & n.1 (1971), is the appropriate standard and, when applied, reveals a 132.9% maximum deviation. The reasons impelling these holdings will be set forth after a brief relation of the limited facts pertinent to this suit's present posture.

FACTS

The court and the Second Circuit have detailed the uncontested facts in the prior opinions. To forego needless repetition,

reference is made to those previous treatments. Morris v. Board of Estimate, 551 F. Supp. at 653-55, rev'd, 707 F.2d at 687-88. Accordingly, only those facts particularly germane to the instant issues will be recounted.

The Board is one of New York City's governing bodies and consists of eight members, who -- importantly -- are a mixture of at-large (city-wide) and district (borough) representatives. As delineated in sections 61 and 62, the Mayor, Comptroller and City Council President possessing two Board votes each, are selected by the metropolitan electorate as a whole. The Borough Presidents of Brooklyn, Queens, Manhattan, Bronx and Staten Island (Richmond), having one Board vote each, are chosen by their respective borough constituencies.[2]

As manifest from the 1980 federal census, the boroughs range appreciably in population.

Borough	Population
Brooklyn	2,230,936
Queens	1,891,325
Manhattan	1,427,533
Bronx	1,169,115
Staten Island	352,121

Yet, notwithstanding that sweep where Brooklyn as the largest has more than six times the population of Staten Island as the smallest, each borough has but one assigned Board vote. That difference in population but equivalence in franchise is the primary basis for plaintiffs' charge that, as Brooklyn residents, the Board's legislative design violates their right to equal protection.

DISCUSSION

I. Methodology

A. The Abate Test

Broadly grouped, reapportionment disputes fall into two categories: quantitative and qualitative.

> "In [a strictly quantitative] case, there are a number of coordinate districts . . . and voters in larger districts allege that their votes are devalued in comparison to those of voters in smaller ones. The issue in a typical reapportionment case, therefore, is whether population deviations from the average district are impermissibly large . . . . The comparison is one based purely on population figures; no showing of discrimination along racial, ethnic, or political lines need be shown."

Nevett v. Sides, 571 F.2d 209, 215 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980) (emphasis added).

A distinctly qualitative suit, in contrast, transcends straightforward computations.

> "[T]he theory of the qualitative reapportionment action is more subtle and abstruse. This action alleges that district lines were drawn or erased so as to diminish the political input of a cognizable element of the voting population."

Corder v. Kirksey, 585 F.2d 708, 710 n.2 (5th Cir. 1978), cert. denied, ___U.S.___, 103 S. Ct. 1253 (1983). See also The Supreme Court 1982 Term - Elections, 97 Harv. L. Rev. 135, 139 (1983) ("Elections") ("[F]air apportionment has two dimensions, one 'quantitative' and the other 'qualitative'. The quantitative dimension -- captured by the one-person-one-vote standard -- requires that each individual's vote be of equal weight, and is compromised when districts are of unequal population. Mere numerical equality among voting districts, however, 'does not guarantee "substantive equality in the sharing of power." ' The qualitative dimension, therefore, requires that individuals be able to act in effective

voices in representation.") (emphasis in original) (footnotes to citations omitted).[3]

Here, though, plaintiffs have limited their attack to the quantitative aspect by intentionally omitting qualitative contentions. See, e.g., Pl. Br. at 28 n.65[4] ("[Plaintiffs'] argument is not, at this time, . . . a racial discrimination claim under the Equal Protection Clause."). Necessarily then, as a quantitative action, this suit's outcome is governed mainly by the Board's variance from the one person, one vote principle. See, e.g., Andrews v. Koch, 528 F. Supp. 246, 252 (E.D.N.Y. 1981), aff'd, 688 F.2d 815 (2d Cir. 1982), aff'd sub nom. Giacobbe v. Andress, __U.S.__, 103 S. Ct. 32 (1982) ("The issue . . . does not implicate questions of political, racial or ethnic discrimination. Simply stated, the question is whether the allocation of an equal number of at-large Council seats to each of the five

boroughs, without regard to substantial population disparities, comports with the constitutional rule of substantial numerical equality . . . .").

While perhaps dispositive in a quantitative suit such as this, deviation from population equality is "fundamental in reapportionment litigation" in general. League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3913 (2d Cir. May 22, 1984). As the Supreme Court has pronounced,

> " ' Population is . . . the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.' "

Reynolds v. Sims, 377 U.S. 533, 567 (1964) (quoted in League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3914 (2d Cir. May 22, 1984) (emphasis added and

footnote omitted by the Second Circuit). See Abate v. Mundt, 403 U.S. at 185 ("[E]lectoral apportionment must be based on the general principle of population equality and . . . this . . . applies to state and local elections."). See also Note, The Reapportionment Dilemma: Lessons from the Virginia Experience, 68 Va. L. Rev. 541, 569 (1982) ("Reapportionment Dilemma") ("Population equality remains the single most important factor in judicial evaluation of apportionment schemes.").

After that elemental investigation of the deviation, any subsequent steps depend on the variation exposed. In Brown v. Thomson, ___U.S.___, ___, 103 S. Ct. 2690, 2696 (1983), the Supreme Court described that disparity's contingent effect on a more searching probe.

> "[W]e have held that 'minor deviations from mathematical equality among state legislative

> districts are insufficient to make out a prima facie case of indivious discrimination . . . so as to require justification by the State.' [Citation omitted.] Our decisions have established . . . that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations . . . . A plan with larger disparities . . . creates a prima facie case of discrimination and therefore must be justified by the State." [5]

Discovering where the Board's legislative plan sets within the Brown variational framework begins with selecting a methodology. Fortunately, the Supreme Court has eased that choice by its demonstrated impatience with mathematical metaphysics.

> "These are the figures found by the District Court. Appellee . . . argues [for] another method of computation . . . . The State and the city . . . disputed that the deviation . . . was as much as claimed. . . . We decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures

actually found by the court . . . ."

Mahan v. Howell, 410 U.S. 315, 319 n.6 (1973) (emphasis added). See Boyer v. Gardner, 540 F. Supp. 624, 628 (D.N.H. 1982) ("[Mahan] indicate[s] a reluctance to involve the courts in statistical complexities, at least absent reasons to indicate that a more complicated approach is required . . . .").

Consistent with that perceived disinclination to entertain esoteric, result-oriented equations, the Supreme Court has approved a simple methodology -- the Abate test -- named for the case in which it was sanctioned.

> "An accepted measure . . . is that of maximum percentage deviation from the population mean. Such a formula was approved by the Supreme Court in Abate v. Mundt, 403 U.S. 182 . . . (1971). The maximum percentage deviation is determined by adding the percentage deviation above the population mean of the

> district with the greatest number of voters to the percentage deviation below the population mean of the district with the fewest number of voters."

Flateau v. Anderson, 537 F. Supp. 257, 261 n.7 (S.D.N.Y. 1982) (three judge court), appeal dismissed, 458 U.S. 1123 (1982). See Brown v. Thomson, ___U.S. at ___, 103 S. Ct. at 2701 ("We have come to establish a rough threshold of 10% maximum deviation . . . (adding together the deviations from average district size of the most underrepresented and most over-represented districts) . . . ."") (Brennan, J., dissenting). See also Andrews v. Koch, 528 F. Supp. at 250 ("This is the formula devised by the Supreme Court to measure the extent to which population disparities among legislative districts either conform or fail to conform to the constitutional requirement of substantial population equality."). See generally Guido, Deviations

and Justifications: Standards and Remedies in Challenges to Reapportionment Plans, 14 Urb. Law. 57, 58 (1982) ("Guido") ("Variances are most commonly expressed as a percentage range, which is the sum of the percentage by which the most populous district exceeds the mathematical ideal and the percentage by which the least populous district falls short of that ideal.").[6]

Besides being simple, the Abate test is also adaptable to disparate representational designs. To illustrate, in Abate itself, the multi-member voting plan of New York State's Rockland County was studied. Abate v. Mundt, 403 U.S. at 184. In White v. Weiser, 412 U.S. at 785, congressional districting in Texas was gauged with that standard.

Assuredly, the Abate test has calibrated apportionment forms more intricate than the Board's. In Andrews v. Koch, 528

F. Supp. at 250, this court modified that measure to isolate the disparity of the New York City Council, which presented a blend of single-member districts, floterial-member districts, at-large member boroughs and an at-large member city.

In that same respect, the New York Court of Appeals in Franklin v. Krause, 344 N.Y.S.2d at 887 used the Abate test to review the Nassau County Board of Supervisors' weighed voting plan. See also League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3891 (2d Cir. May 22, 1984) (surveying with the Abate test that same legislative model after a 1980 census-induced reapportioning).

In brief, the Board's mixed structure of five borough members with one vote each and three at-large members with two votes

each certainly does not preclude employing the Abate test, given its proven versatility.

B. Defendants' Methodologies

Despite the settled Abate test's simplicity and adaptability, defendants contend that it is unserviceable here due to the Board's three at-large members. The Second Circuit, also, presumed in dicta that their presence posed unique questions.

> "[T]he fact that three members . . . are elected at large . . . raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative."

Morris v. Board of Estimate, 707 F.2d at 690 n.3.

Actually, the Board's essential electoral design is unexceptional and does not present first-impression measurement problems. Indeed, the Board's at-large and borough amalgam compares to other governing bodies

exercising legislative functions, whose apportionments have been assessed utilizing the Abate test. See, e.g., Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. 1012, 1015 (D. Mass. 1983), stay denied, 716 F.2d 68 (1st Cir. 1983), stay denied, ___U.S.___, 104 S. Ct. 5 (Brennan, Circuit Justice, 1983) (City Council and School Committee plans of Boston, Massachusetts, with each having four at-large and nine district members); Cohen v. Maloney, 410 F. Supp. 1147, 1149 & n.2, 1150 (D. Del. 1976) (City Council of Wilmington, Delaware, with four at-large and five district members). See generally Markoe v. Legislature of the Virgin Islands, 592 F.2d 188, 190-91 & n.2 (3rd Cir. 1979) (Senate of Virgin Islands with one at-large -- a St. John's Island resident -- and fourteen members evenly divided between two districts); Perry v. City of Opelousas, 515

F.2d 639, 641 & n.2 (5th Cir. 1975) (Board of Aldermen of Opelousas, Louisiana, with one at-large and five district members); Martin v. Venables, 401 F. Supp. 611, 613, 614 & n.2 (D. Conn. 1975) (Town Council of Stratford Connecticut, with one at-large and ten district members).

Like those polities, the Board's basic structure is a composite pattern. And as those polities have been, the Board also can be gauged by the Abate test -- irrespective of the at-large representation.

In short, sufficient decisional precedent exists to avert -- as unwarranted -- an unchartered departure from the Supreme Court's approved standard. See id. ("[T]he Supreme Court has indicated that total maximum deviation is the measure to be used and this Court is obligated to use it." See also Dodge & McCauley, Reapportionment: A Survey of the Practicality of Voting

Equality, 43 U. Pitt. L. Rev. 527, 536 (1982) ("[T]he . . . Supreme Court, the lower federal courts, and the various state courts have developed a relatively precise and simple mathematical model for the measurement of population equality. The basic standard . . . is determined by the relationship between the population of the largest and smallest election district . . . .").

Concomitantly, the court rejects defendants' flawed tests. To particularize, city defendants would forego all mathematical analysis.

> "[T]he Court's methodology . . . should be functional . . . . First, the Court should identify the constitutional objectives of the one person, one vote principle. Second, the Court should undertake a qualitative inquiry into the Board's scheme of representation."

City Def. Br. at 5.

That procedure is not the law. Abate aside, as discussed, population equality is the "starting point" and "controlling criterion." Reynolds v. Sims, 377 U.S. at 567. See Cohen v. Maloney, 410 F. Supp. at 1150 ("[S]tate and local governments have a duty . . . to make population the prime criterion in any apportionment . . . ."); Grisbaum v. Jefferson Parish Council, 336 F. Supp. 267, 271 (E.D. La. 1971) ("The . . . Supreme Court has consistently held that the controlling criterion . . . is that the Constitution permits no substantial variation from equal population . . . ."). Cf. Connor v. Finch, 431 U.S. 407, 409-10 (1977) ("[B]oth the Senate and the House reapportionments . . . fail to meet the most elemental requirement . . . -- that legislative districts be "as nearly of equal population as is practicable.' ") (quoting

Reynolds v. Sims, 377 U.S. at 577) (emphasis added).

While city defendants might prefer that it not do so, the law does require that population equality be the reapportionment referrent and, consequently, deviations therefrom be marked off. Plainly stated, that inequality audit cannot be foregone.

Intervenor defendant Ponterio, on the other hand, does not neglect the variance's ascertainment but advances a specially tailored methodology.

> "I have developed an analysis which both recognizes the Board's overlay of city-wide and borough votes and examines every voting rule under which the Board functions."

September 30, 1983, Aff. of I. Def. Ponterio at 8.

That analysis is premised on equating the Board to a floterial district.

> "The Board may be looked upon as a single floterial district, the super-district being the City and the sub-districts the five boroughs. Each Borough President is a sub-district representative and the city-wide members are the super-district representatives."

Id. at 9.[7] Therein lies the foundational fault.

By analogy or otherwise, the Board is not akin to a "single floterial district." In Davis v. Mann, 377 U.S. 678, 686 n.2 (1964), the Supreme Court defined that model.

> " '[F]loterial district' . . . refer[s] to a legislative district which includes . . . several separate districts . . . which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned."

See, e.g., Boyer v. Gardner, 540 F. Supp. at 626 ("When any town . . . [etc.] . . . has fewer than the number of inhabitants

necessary to entitle it to one representative, [floterial] districts with enough inhabitants to entitle the district to one or more representatives.").

No definitional plasticity can liken the Board to an immense floterial district. The Board is an entire legislative model while a floterial district is but a component. See, e.g., Mahan v. Howell, 410 U.S. at 318-19 ("The statute apportioning the [Virginia House of Delegates] provided for a combination of 52 single-member, multimember, and floater delegate districts from which 100 delegates would be elected.") Boyer v. Gardner, 540 F. Supp. at 626 (A plan which reapportioned the New Hampshire House of Representatives "establish[ed] 162 electoral districts, of which 17 were so-called floterial districts.") (footnote omitted).

Additionally, Ponterio's matching the dissimilar leads him to questionable

"accommodations". September 30, 1983, Aff. of I. Def. Ponterio at 10. Weighting each delegate's vote is one such problematical adjustment.

> "Each city-wide member's vote is weighted by the population he represents . . . viz., the total city population of 7,071,030. Each Borough President's vote is weighted by his borough's population."

Id. at 11.

That accommodation distorts the city-wide members' voting power. Despite in reality having only a 6-5 ballot advantage, the at-large have a 3-1 Board dominance (by individual) under Ponterio's methodology.[8] Described another way, Ponterio augments the Board's city-wide total by the metropolitan population three times, whereas he enhances the Board's borough total by the metropolitan population just once (since the five boroughs' aggregate population

equals one times the metropolitan population).

Increasing the city-wide members' strength to that extent demonstrably decreases the found deviation. To elaborate, since Ponterio computes the combined effect of the city-wide and borough representation, the bolstered at-large presence so overwhelms the borough delegation that the population inequalities among the boroughs are not even roughly translated into the ascertained disparity.

Comparing results illustrates the deviation's marked diminution and its unrelatedness to the unequal borough populations with Ponterio's approach. As noted, Brooklyn has more than six times Staten Island's population. When the disproportion between the two (as the most underrepresented and overrepresented boroughs) is calculated by either the

Supreme Court's Abate test or a (suggested) modification thereof, the yield is 132.9% or 78%, respectively. See infra p. 31 and Pl. Br. at 32-33. Those figures vary substantially from one another but both are credibly high, reflecting the considerably unequal borough populations, which are at the base of each computation and at the heart of this lawsuit.

In contrast, when calculated by Ponterio's methodology, the deviation plummets to 16.4%. See September 30, 1983, Aff. of I. Def. Ponterio at 18 (Table IX).[9] That percentage has no plausible relationship to the indisputable inter-borough population differences. To the contrary, as partially a product of the weighting accommodation, which itself flows from the unsound floterial premise, that figure mutes the discrepancies among the boroughs.

But even apart from such flaws, the court would reject Ponterio's methodology as it would city defendants'. Neither is needed. As seen, the Supreme Court sanctioned Abate test has assessed apportionments of comparable and of greater complexity. That being so, promulgation of a special formula is uncalled for in this case.

C. The Unmodified Abate Test

The remaining methodological question, then, is whether the Abate test must be modified to account for the at-large representation. Plaintiffs, as mentioned, do proffer one such adjusted measure similar to that used in Andrews v. Koch, 528 F. Supp. at 250. See Pl. Br. at 32-33. The court, nonetheless, determines conversion unnecessary.

At the time of Andrews, the City Council consisted of forty-six seats: one (the President) was city-wide; thirty-five

were from districts and ten were from the boroughs (i.e., two from each). Andrews v. Koch, 528 F. Supp. at 248.[10] In fact, three of those thirty-five districts were floterial. Id. at 250 n.6. Yet, despite that confluence of several representational types, the equal protection challenge was aimed solely at the disparity caused by the five borough delegate pairs.

Notwithstanding that focus, the court rejected the depiction of the five boroughs as multimember districts distinct from those councilmanic districts within the boroughs or shared by two boroughs. The Court, instead, decided that the total electoral dynamic within each borough had to be surveyed in arriving at the real deviation. Id. at 250 n.7.

To accomplish that, the court modified the Abate test to encompass the full complement of each borough's councilpersons,

viz., the two borough-wide delegates, the district delegates from within each borough and the floterial district delegates by proportional share. Id. at 250.

In this case, that variety of borough delegate layers is missing. Thus, while the one person, one vote challenge is also aimed at the borough representation, only one such delegate tier, in fact, sits on the Board -- the Borough Presidents. So, differing from Andrews which required a multidimensional gauge for measuring the combined representational voices from each borough, this case necessitates only a linear methodology. Put differently, each borough voter has one designated borough agent on the Board -- the Borough President. That straight line, one-to-one relationship easily lends itself to an unmodified Abate analysis.

Nor does the city-wide membership subvert the Abate test. Courts faced with

mixed designs have simply excluded the at-large positions from the malapportionment mathematics. See, e.g., Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. at 1015 (In figuring the 23.6% deviation for the Boston, Massachusetts' City Council and School Committee plans with thirteen members each, the court measured only the respective nine single-member districts, disregarding the respective four at-large seats.); Cohen v. Maloney, 410 F. Supp. at 1150 (In calculating the 18.3% disparity for Wilmington, Delaware's City Council, the court only assessed the eight single-member districts, without considering the five at-large slots.); Perry v. City of Opelousas, 515 F.2d at 641 & n.2 (In determining the 6.2% disproportion for Opelousas, Louisiana's Board of Aldermen, the court focused on the five single-member districts, without factoring in the one

at-large member.); Martin v. Venables, 401 F. Supp. at 613, 614 & n.2 (In arriving at the 50.7% variance for Stratford, Connecticut's Town Council, the court audited the ten single-member districts, omitting the one at-large position.).

Significantly, when charges of one person, one vote violations have been brought in other suits involving these same boroughs, the purported impacts of the city-wide delegates have not been considered. In Oliver v. Board of Education, 306 F. Supp. 1286 (S.D.N.Y. 1969), a challenge rooted in the boroughs' unequal population dispersal was made to New York City's Board of Education, consisting of five electees from the boroughs and two at-large appointees selected by the Mayor.

In holding that the legislative scheme was constitutionally infirm, the court

concentrated only on the interborough population discrepancies without taking into account any influence the mayoral at-large appointees might have had on the malapportionment.

> "[F]ive members . . . are to be elected, one from each county. The other two are to be appointed by the mayor. It is clear beyond question that plaintiff's vote for the Kings County [Brooklyn] member will carry less weight than the votes of residents of other counties for the representatives of those counties."

Id. at 1289.

Similarly, as already noted, this court in Andrews v. Koch, 528 F. Supp. at 248, 250, did not include in the New York City Council's measurement the one actual at-large representative -- the President. Instead, the equal protection inquest was focused completely at the boroughs -- the locus of the inequality.

While that official's tie-breaker status constituted limited voting power, see 1 New York City Charter & Ad. Code Ann. §23(d) (Williams press 1976 & Supp. 1982-83), making any assumed effect on the boroughs' disparity probably de minimus and certainly difficult to accurately ascertain, the pertinence for this case is that no such measurement was attempted. The City Council President's presence relative to the malapportionment was disregarded.[11] See generally Avery v. Midland County, 390 U.S. 474, 476, 485 (1968) (In reaching its decision that the one person, one vote rule applied to local governments and, hence, to the Commissioners Court of Midland County, Texas, the Supreme Court marked the "vast imbalance" without discussing the one at-large representative's impact other than noting that that person "vote[d] only to break a tie.").

To be sure, in Oliver and Andrews as well as in the cases cited from other jurisdictions, whether to exclude the at-large representation was not an explicit issue. Nor should it have been. In an ideal plan, a voter regardless of location has as equal an opportunity to elect an at-large delegate (and thereby be heard) as any other voter.[12] See City of Mobile v. Bolden, 446 U.S. 55, 78 (1980) ("There can be . . . no claim that the 'one person, one vote' principle has been violated . . . because . . . Mobile is a unitary electoral district and the Commission elections are conducted at large."). See generally Dusch v. Davis, 387 U.S. at 115-16 (In approving the electoral design for Virginia Beach, Virginia's City Council consisting of seven at-large members, who were residents of particular boroughs, and four other at-large members, who were chosen without regard to

residency, the Supreme Court stated that, "The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by . . . all the electors in the city. . . . If a borough's resident on the council represented in fact only the borough . . . , different conclusions might follow.") (emphasis added).

By parity of reasoning, at-large members in an untainted representational scheme are beholden to no individual district (or borough) but serve the electorate as a whole. [13] Cf. Fortson v. Dorsey, 379 U.S. at 438 (In finding no constitutional defect in Georgia's state senatorial reapportionment plan requiring county-wide elected senators to be residents of districts within certain counties, the Supreme Court said that, "The statute uses districts . . . as the basis of

residence . . . not for . . . representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve . . . all the people in the county . . . ; thus . . . he is the county's and not merely the district's senator.") (emphasis added); Markoe v. Legislature of the Virgin Islands, 592 F.2d at 190 (In reviewing the apportionment of the Virgin Islands' fifteen-person Senate where one at-large electee had to be a St. John's Island resident, the court applying Fortson concluded that, "[T]he senator at large must be counted as a representative of the entire territory . . . . ").

Hence, at least in principle, a quantitative vote devaluation such as occurs among substantially unequal single-member districts is absent in an at-large design.[14] See City of Mobile v. Bolden, 446 U.S. at 66

("The constitutional objection to multimember districts . . . cannot be that . . . they depart from apportionment on a population basis . . . ."). See also Packer, Tracking the Court Through a Political Thicket: At-Large Election Systems and Minority Vote Dilution, 23 Urb. L. Ann. 227, 258 (1982) ("By definition, an at-large district treats all voters equally. . . . At-large districting does not involve the individual deprivation characteristics of a fundamental rights violation.") (footnote omitted).

So, failing to assess the at-large membership's impact on the deviations in the cited cases conformed to the theoretical relationships that those representatives had with their electorates. Quite correctly then, the measurements converged on where the inequalities were -- among the districts (the Board's borough equivalents).

Besides being in harmony with those theoretical relationships, deleting the at-large tacitly accorded with a common sense mathematical limitation. To the point, evaluating the effect -- if any -- of at-large representation on inter-district inequality means <u>speculatively</u> assigning those at-large votes among the districts. If that step is taken and the limitation thereby ignored, a deviational figure of doubtful validity is received.

With respect to this case, Professor Steven J. Brams, who specializes in applying mathematical models to legislative patterns, stresses the infecting discretion inbred in such an assignment and advances a preventive approach.

> "[A]ny quantitative method for analyzing the Board that attempts to allocate the citywide members' votes among the boroughs is inevitably arbitrary and <u>ad hoc</u> . . . . In my opinion, the most appropriate methodology for

> analyzing the representation of individual citizens on the Board . . . is one which treats the two groups of representatives separately."

App. to Pl. Br., Aff. of Professor Brams at 5 (emphasis in original).[15]

The court accepts that common sense view and, extending therefrom, perceives that the absence of the at-large exclusion issue in the cited decisions was not merely due to advocate oversight. On the contrary, as shown by the cited authority, the caselaw appears too consistent to be the product of such persistent inadvertence.

Indeed, as opposed to oversight, certain cases demonstrate a conspicuous purposefulness in omitting the at-large from the measurement, as here, of hybrid legislative models. See Markoe v. Legislature of the Virgin Islands, 592 F.2d at 190-91 & nn. 2-3 (The court reviewed two apportionment plans for the Virgin Islands'

fifteen-person Senate. Under the proposed "8-7" plan, the larger of two districts would have eight senators and the smaller seven. Under the "7-7-1" scheme, which was in effect, each district had seven; and, in addition, one senator was elected at-large, although required to be a resident of the smaller district. In isolating the respective 9.9% and 3.5% disparities, the court included all fifteen members in the "8-7" plan's measurement but only fourteen members in the "7-7-1" scheme's assessment, specifically excluding the one at-large senator.); Grisbaum v. McKeithen, 336 F. Supp. at 272 (The Jefferson Parish Council of New Orleans, Louisiana, had four representatives from single-member districts, two serving two districts each and one elected at-large. In separately calculating a 60% variance among the single-member districts and a 40% deviation between the sets of multiple

districts, the court did not gauge the impact of the at-large on either.).

Thus, independent of not being explicitly raised, the at-large exclusion issue's nonappearance in the noted decisions seems traceable, in part, to an unstated understanding that infusing the malapportionment formula with the electorate-wise representation would have been conjectural adulteration. But whether or not that caselaw distillation is correct, this case explicitly raises that issue; and this court recognizes the speculative contamination inherent in injecting the city-wide membership into the inequality calculus. At the least, the prior decisions are consistent with that recognition.

Finally, deleting the at-large in those previous cases accords with the Supreme Court's example. For, as mentioned, the Supreme Court has exhibited a

> "reluctance to involve the courts in statistical complexities, . . . absent reasons to indicate that a more complicated approach is required. . . ."

Boyer v. Gardner, 540 F. Supp. at 628. Cf. League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3917 (2d Cir. May 22, 1984) ("[T]he Supreme Court's review of State and local government legislative plans has been noteworthy for the nonpromulgation of strict mathematical tests.") (emphasis in original). The at-large's surmised influence on district disproportions would not have been a reason to engage more sophisticated methodologies (of suspect reliability).[16]

To summarize this discussion section, unlike the New York City Council's more intricate electoral design confronted in Andrews, the Board's simpler at-large and borough legislative plan is accessible to the

unmodified Abate test. Nor does the city-wide presence dictate adjusting that methodology. As prior decisions properly have done, the at-large representation should be eliminated from the deviation computation. That approach comports with the Board's existing theoretical relationships, with the common sense limitation on valid mathematical assessment and, ultimately, with the Supreme Court's guidance.

D. The Unmodified Abate Test Applied

Therefore, the Abate test is not only applicable, but applicable without modification. As thus applied, the individual inequalities are:

Borough	Population	Deviation
Brooklyn	2,230,936	-57.7%
Queens	1,891,325	-33.7%
Manhattan	1,427,533	- 0.9%
Bronx	1,169,115	+17.4%
Staten Island	352,121	+75.2%

Computing the -57.7% variance of Brooklyn as the most underrepresented borough with the +75.2% variance of Staten Island as the most overrepresented borough, the maximum deviation is 132.9%.

II. Justifications

The present voting allocation would appear to be unconstitutional. See Abate v. Mundt, 403 U.S. at 187 (The Supreme Court approved an 11.9% justified deviation but added that "[N]othing we say today should be taken to imply that even these factors could justify substantially greater deviations . . . . "); Mahan v. Howell, 410 U.S. at 329 (The Supreme Court accepted a 16.4% variance, which was also excused, but remarked that "While this percentage may well approach tolerable limits, we do not believe that it exceeds them.").

Nevertheless, this court has been instructed to "rule on the policies and

interests which the Supreme Court has held may justify deviations . . . ." Morris v. Board of Estimate, 707 F.2d at 690. Moreover, addressing such possible justifications conforms with the parties' stipulation bifurcating these proceedings. Accordingly, the court will now outline the areas of inquiry and initial approach for this second stage.

Since the Second Circuit's opinion, the Supreme Court has further elaborated on specific, legitimate justifications. In Karcher v. Daggett, ___U.S.___, ___, 103 S. Ct. 2653, 2663-64 (1983), within the context of the more stringently scrutinized congressional districting,[17] the Supreme Court advised:

> "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding

> contests between incumbent representatives. As long as the criteria are nondiscriminatory, . . . , these are all legitimate objectives that . . . could justify minor population deviations."

(Emphasis added.) See Elections, 97 Harv. L. Rev. at 141 ("[Karcher] does substantially broaden -- at least in dicta -- the range of interests that the [Supreme] Court will consider.") (emphasis in original).

In Brown v. Thomson, ___U.S. at ___, 103 S. Ct. at 2696, rendered the same day, the Supreme Court restated certain considerations noted in Karcher and previously reckoned as acceptable for state and local governments.

> "We have recognized that some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as 'maintain[ing] the integrity of various political subdivisions' and 'provid[ing] for compact districts of contiguous territory.' "

(Citation omitted; brackets by Brown Court.) See Elections, 97 Harv. L. Rev. at 137 n.14 ("Brown illustrates the [Supreme] Court's greater willingness to tolerate population deviations in state legislative apportionments when such deviations are justified by an appropriate state policy. The [Supreme] Court upheld . . . a Wyoming statute providing that each county was to be given at least one representative in the state house . . . . Wyoming's longstanding . . . policy of using counties as representative districts was supported by . . . legitimate . . . concerns and . . . the incremental dilution of the challengers' voting power resulting from . . . granting . . . a representative to the least populous county was de minimis.").

During the justification inquiry then, the parties are to look to those areas mentioned in Karcher and Brown -- if

appropriate -- plus any other pertinent areas reviewed by the Supreme Court in earlier cases. See, e.g., Abate v. Mundt, 403 U.S. at 186 ("The need for intergovernmental coordination is often greatest at the local level . . . But because almost all governmental entities are interrelated . . . , we would be hesitant to accept this justification by itself. To us, therefore, it is significant that Rockland County has long recognized the advantages of having the same individuals occupy the governing positions of both the county and its towns.").

Besides express Supreme Court statements, guidance in establishing or refuting proposed interests also may be sought from other judicial precedent in general accord with the Supreme Court's pronouncements. See, e.g., Andrews v. Koch, 528 F. Supp. at 251 ("[T]he interests

defendants urge in support of the status quo appear to be essentially political."); Cohen v. Maloney, 410 F. Supp. at 1154 ("[N]atural boundaries may sometimes be regarded as a legitimate consideration justifying a particular apportionment plan . . . . [S]uch boundaries may create communication and association barriers of substantial significance in the administration of local government. . . . The facts of this case, however, do not suggest that the Brandywine [River] is a natural boundary which has traditionally been of significance in the administration of local government.").

The parties, in addition, are to examine two particular concerns already raised in the record. First, the Board's conceded effectiveness is to be addressed.[18] See generally Franklin v. Krause, 344 N.Y.S.2d 888-89 ("It has been argued to us, without material opposition, that the small board

. . . is the most efficient form of government, and has proved to be such over the years.").

Second, the parties are to explore the alleged meaningful participation by the lesser populated boroughs in Board affairs under its present structure.[19] See Reynolds v. Sims, 377 U.S. at 565-66 ("[T]he achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment . . . .") (emphasis added); Travis v. King, 552 F. Supp. at 560 ("[T]he . . . rationale advanced by the state [of Hawaii] . . . is its desire to provide each . . . island . . . with meaningful representation . . . . Based on the unique geographic and economic insularity of the . . . island[s] . . . , along with the state's simplified and centralized . . . government, we find that the . . . policy is . . . rational . . . .")

(footnote omitted). Cf. Morris v. Board of Estimate, 707 F.2d at 691 ("Whether the present allocation of seats . . . is a constitutionally permissible way of blending majority control with minority representation . . . is one issue to be examined on remand.").

Ascertaining at this time whether significant input by the smaller boroughs is a valid concern fostered by the Board may be especially important if the Board is eventually reapportioned, since certain electoral models "assure that sparsely populated areas . . . have a voice in the councils of government." Greenwald v. Board of Supervisors of the County of Sullivan, 567 F. Supp. 200, 203 (S.D.N.Y. 1983) (upholding the constitutionality of an adjusted weighted voting plan) (footnote omitted). See also Baker v. Regional High School District No. 5, 476 F. Supp. 319,

321, 323 (D. Conn. 1979) (In tentatively approving an "ingenious" condition for a three-town board of education preventing majority votes from being carried by the largest town alone or by the two smallest towns together, the court described the total plan as an apparently "conscientious effort to comply with constitutional requirements while providing sufficient checks on majority action . . . ."). See generally Sailors v. Board of Education, 387 U.S. 105, 110-11 (1967) ("Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.").

But future forms aside, investigating justifications here is to be in accordance with the inquiry outlined in Mahan as lately summarized in Brown:

> "whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.' "

Brown v. Thomson, ___U.S. at ___, 103 U.S. [sic] at 2696 (quoting Mahan v. Howell, 410 U.S. at 328) (brackets by Brown Court).[20]

Finally, the court emphasizes that nothing in the aforesaid is to be construed as a predetermination that the Board does or does not advance specific, valid policies and interests. In that vein, the mentioned areas of inquiry are not by limitation. The number of such putative considerations to be probed is up to the parties as guided by the designated caselaw.

Consistent with the foregoing, the court directs the parties to begin conferring by September 14, 1984. The product of that good faith exchange will be a joint

stipulation for submission no later than October 5, 1984, listing with conciseness and specificity:

> (1) those agreed valid policies and interests presently served by the Board; and
>
> (2) those disputed policies and interests which at least one defendant maintains are valid and are presently served by the Board. For each such disputed consideration, plaintiffs are to explain the basis of their objection.

After reviewing that joint stipulation, the court will schedule a conference with the parties to discuss the subsequent procedure for bringing this litigation to an expeditious and equitable end.

SO ORDERED.

Copies of this Memorandum and Order are being forwarded to counsel for the parties, to the intervenor-defendants, and to the amicus curiae.

_____
U.S.D.J.

Dated: Brooklyn, New York
August 21, 1984

F O O T N O T E S

[1] After the Second Circuit's decision, interested others have participated. Citizens Union of the City of New York has submitted an amicus curiae brief urging the Board's unconstitutionality. The Honorable John J. Marchi, representing Staten Island in the New York State Senate, has also tendered an amicus curiae brief but asserting a contrary position. Finally, the Honorable Robert A. Straniere, serving Staten Island's 60th District in the New York State Assembly, has intervened as a defendant maintaining, like Marchi, that the Board is not constitutionally deficient.

[2] That allotment differs on budgetary matters for which the Mayor, who proposes the budget, is without a vote but may veto changes by the Board and City Council acting concurrently. Those bodies, in turn, may override the Mayor. 1 New York City Charter & Ad. Code Ann. §§120-21, 222-23 (Williams Press 1976 & Supp. 1982-83).

[3] A legislative model may be denounced on both grounds. See, e.g., Corder v. Kirksey, 585 F.2d at 709 ("[P]laintiffs contested . . . that the districts did not satisfy the 'one person, one vote' mandate . . . . They also . . . alleged that . . . [the at-large election method] . . . operated to dilute the black vote . . . . [P]laintiffs' case, therefore, sounded in both genres of reapportionment actions: the 'quantitative' (one person, one vote) and the 'qualitative' (dilution).") (footnote omitted).

[4] Besides Pl. for Plaintiffs and Br. for Brief or Memorandum of Law, the following

abbreviations will be used when referring to the submissions: City Def. for City Defendants; I. Def. for Intervenor Defendant; Aff. for Affidavit; App. for Appendix; and Ex. for Exhibit.

[5] The Supreme Court's discussion for State legislatures pertains to local governments, too. See L. Tribe, American Constitutional Law 747 (1978) ("Local apportionment proposals have been judged by standards essentially identical to those applied to states.").

On the other hand, congressional districting -- overseen by the constitution's article I, section 2 as opposed to the equal protection clause for State and local governments -- is held to much stricter standards. See, e.g., White v. Weiser, 412 U.S. 783, 790 (1973) ("The command of Art. I, §2, that representatives be chosen 'by the People of the several States' . . . permit[s] only those population variances among congressional districts that 'are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.' ") (citation omitted).

[6] Adding the extreme percentage deviations is not complicated by calculating the ideal and the departures therefrom may involve more elaborate computations depending on the electoral scheme. See, e.g., Franklin v. Krause, 344 N.Y.S.2d 885, 887 (1973), appeal dismissed, 415 U.S. 904 (1974) (measuring an adjusted weighted voting system) (discussed infra p. 12).

[7] Followed by a detailed explanation, Ponterio out-lines his methodology as

> "an adaptation of the aggregate method of analyzing floterial districts. In the aggregate method, there is no attempt to divide super-district representation among the sub-districts, proportionately or otherwise. . . . Only an overall population-per-vote ratio is defined, viz., the total super-district population divided by the sum of sub-district and super-district votes."

Id. at 10.

[8] Along with the weighting in general, plaintiffs have criticized Ponterio for ignoring the city-wide members' possession of two votes each, since he weights individuals and not the votes the individuals hold. See App. to Pl. Br., Aff of Professor Steven J. Brams at 3 & n. Thus, if Ponterio's methodology augmented Board votes rather than bodies, the result would be a 6-1 city-wide dominance.

Responding to that criticism, Ponterio (by a later submission) has offered a revised version.

> "The modification consists . . . of weighting each city-wide member by the total population of the City, multiplied by 2 (to account for his 2 votes), and divided by 5 . . . ."

January 24, 1984, Aff. of I. Def. Ponterio at 6.

That ministering more aligns Ponterio's methodology with the 6-5 ballot breakdown. It does not, however, cure the more fundamental infirmities in Ponterio's approach. For instance, the inapposite floterial analogy remains as does the most objectionable aspect of his measurement -- the inclusion of the city-wide representation at all in the malapportionment assessment. See infra pp. 21-30.

9 The deviation under Ponterio's altered methodology escalates to 30.66%. See January 24, 1984, Aff. of I. Def. Ponterio at 12 (Table 8).

10 In Andrews, the court's calculus did not consider the City Council President, who -- chosen by the entire City -- was the one truly at-large representative. See infra p. 23. With that seat omitted, the court for clarity referred to the borough-wide representatives as at-large, although only selected by their respective borough electorates.

That designation differentiated them from the district delegates elected mostly from areas within the boroughs. That terminology also comported with the Charter. See, e.g., 1 New York City Charter & Ad. Code Ann. §22(b) (Williams Press 1976 & Supp. 1982-83) ("[T]wo council members shall be elected at-large from each of the boroughs.")

The Board, in contrast, has no district slots from inner-borough areas. Moreover, a distinct borough and city-wide membership distribution exists, which was not the Andrews situation. See infra note 11.

Consequently, the Andrews classifications cannot be followed here. So, as they have been, the Borough presidents will be denominated as either the district or borough representatives, while the Mayor, City Council President and Comptroller will be referred to as either the at-large or city-wide representatives.

11 Given the similarity between the two cases (quantitative equal protection challenges to New York City governing bodies), another clarifying point should be made regarding Andrews in relation to this suit. There, this court stated that "all Council members, however elected, sit as one body and represent the entire City." Andrews v. Koch, 528 F. Supp. at 250 n.7. That accurately portrayed the City Council's legislative design since its President -- the only city-wide official -- was without significant voting power, as just mentioned. New York City, then, was without a specific block of city-wide advocates. Missing such, the other combined members (forty-five borough and district representatives) were, of necessity, the "one body representing] the entire City." Id.

Decidedly, the Board's structure is different. Distinct city-wide delegates with formidable balloting strength exist. Furthermore, as Mayor, City Council President and Comptroller, their city-wide orientation is preordained by possessing other Charter powers -- the Board seats not being their principal elective offices. See, e.g., 1 New York City Charter & Ad. Code Ann. §§8, 23, 93 (Williams Press 1976 & Supp. 1982-83) (generally describing their respective powers and duties).

Thus, whereas in Andrews all City Council members had to serve both their particular constituencies and the City electorate as a whole due to the quasi-absence of at-large membership, here, the Board does have a substantial at-large block, whose roles are manifestly demarcated from those of the borough members. That being so, the Andrews description of all City Council members "represent[ing] the entire City" cannot by analogy be accurately applied to the Board's members. See generally Dusch v. Davis, 387 U.S. 112, 115-16 (1967) (quoted infra at pp, 24-25); Fortson v. Dorsey, 379 U.S. 433, 438 (1965) (quoted infra at p. 25); Markoe v. Legislature of the Virgin Islands, 592 F.2d at 190 (quoted infra at pp. 25-26).

12 Certainly, at-large plans that are not ideal (i.e., qualitatively contaminated) can impinge on substantial equality. One such system wad described in Perry v. City of Opelousas, 515 F.2d at 641.

> "[T]he all-at-large electoral system has unconstitutionally diluted the voting rights of Opelousas blacks. The long history of racial discrimination, the City's culpable neglect of black interests, Louisiana's anti-single shot and majority vote requirements and the local racially-polarized voting patterns all support the district court's conclusion that these factors, when combined with the white voting majority, have made the multi-member district a certain instrument of dilution."

See also Rogers v. Lodge, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district. A distinct minority . . . may be unable to elect any representatives in an at-large election . . . .") (emphasis in original).

Nonetheless, as mentioned, plaintiffs have confined their challenge to a quantitative objection directed only at the disproportionate borough representation, thereby making no allegation that as a consequence of the city-wide delegation, their ballots are devalued. In fact, plaintiffs in the alternative have put forth methodologies attempting to account for the at-large members' supposed mitigating influence on the inequality. See Pl. Br. at 32, 34.

[13] See generally supra note 11.

[14] Establishing the quantitative inoffensiveness of an at-large electoral plan has been material to the court's analysis. In making that point, however, the court has explained that which appears in theory to be uncontested here. See, e.g., Pl. Br. at 30 ("City-wide members represent citizens as citizens of the City, not as residents of particular boroughs."); City Def. Br. at 23 ("By definition, the city-wide members represent the entire City and any attempt to allocate their votes to the borough representatives only results in a gross distortion of the Board's representation scheme."); September 30, 1983, Aff. of I. Def. Ponterio at 3 ("[W]hen a city-wide

member votes, all of the people of the City are represented.") (emphasis in original).

15 By "separately," Professor Brams means, in this case, excluding the at-large. See id. ("Since the citywide members are elected at large, they pose no equal-representation problem. The Borough Presidents, however, are elected from districts with vastly different populations, and it is their citizens who are denied equal representation . . . .").

Also, in line with his general position, Professor Brams disavows any of plaintiffs' methodologies factoring in the alleged salutary consequences of the city-wide representation on the inter-borough disproportions. See id. ("To the extent that Plaintiffs have proposed models which . . . [allocate the citywide . . . votes] . . . . , I disagree with them.").

16 In this case, for instance, if the city-wide members were not eliminated, the chosen methodology would have to account for their two votes each to the borough members' one each. Also, the deviation for budgetary matters where the Board is mayorless would have to be separately computed. See supra p. 5 & note 2. Excluding the city-wide precludes those complications.

17 See supra note 5.

18 Ponterio, on the defendants' side, has advanced the Board's effectiveness as a consideration. See September 30, 1983, Br. of I. Def. Ponterio at 28 ("[T]he Board's] effectiveness in providing for the health,

welfare, safety, morals, public convenience, and general prosperity is an overriding police-power concern . . . .").

While not acknowledging effectiveness, in general, as a valid consideration, Richard Emery, plaintiffs' counsel, has admitted that the Board does further that interest. See June 6, 1982, Hearing Transcript at 53 ("[T]hough the Board . . . may work very well and may be very efficient and I concede that . . . it nevertheless is an undemocratic institution . . . .").

19 Straniere, for the defense, has put forth meaningful participation by Staten Island in Board business as a valid justification. See Br. for I. Def. Straniere at 22 ("[R]eapportioning the Borough Presidents' votes based strictly on population figures would completely silence the small but equal voice brought to the Board's discussions by Staten Island's Borough President and would directly contradict a legitimate state policy . . . followed for over eighty-two years.").

In fact, regarding that asserted consideration, an exhibit tendered by plaintiffs has forecast the ramifications for Staten Island if reapportionment proceeds strictly on a population basis. See Kramarsky Aff. and Ex.: "The Kramarsky Study" at 116-17 ("[K]eeping control of the Board with its city-wide members and reapportioning the Borough Presidents' votes according to population would reduce the Borough President of Staten Island to the status of an observer in the Board's deliberations.").

[20] Since plaintiffs have conceded the Board's effectiveness (i.e., it furthers effectiveness), the only issue on that interest will be whether that consideration, indeed, is a valid one. See supra note 18.

DECISION OF THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT
Dated May 16, 1983
Docket No. 83-7007

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellants,

-against-

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as City Council president, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough presidents of the boroughs of the City of New York,

Defendants-Appellees,

and

FRANK V. PONTERIO,

Intervenor-Defendant-Appellee.

Before: KAUFMAN and NEWMAN, Circuit Judges and LASKER, District

Judge.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Neaher, Judge), holding the one person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment inapplicable to the New York City Board of Estimate.

Reversed and remanded.

Richard Emery, New York, N.Y. (Arthur Eisenberg, New York Civil Liberties Union, New York, N.Y., on the brief), for Plaintiffs-Appellants.

Judith A. Levitt, New York, N.Y. (Frederick A. O. Schwarz, Jr., Corp. Counsel, Leonard Koerner, Susan D. Rosenberg, New York, N.Y., on the brief), for Defendants-Appellees.

Frank V. Pontiero, Staten Island, N.Y., for Intervenor-Defendant-Appellee, pro se

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*Hon. Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

Alan Rothstein, New York, N.Y,
for Amicus Curiae Citizens Union
of the City of New York.

This appeal presents the question whether the equal protection principle of one person, one vote is applicable to the election of members of the New York City Board of Estimate.

The Board of Estimate ("the Board") is one of the governing bodies of New York City. It exercises a wide range of powers, including the power to negotiate and enter all contracts on behalf of the city; to approve or modify all zoning decisions for the city; to set tax abatements; and to determine the use and development of all property owned by the city. In addition, in conjunction with the City Council, the Board recommends and approves the city's expense and capital budgets.[1]

The Board has eight members. Three of the members, the Mayor, the Comptroller and the President of the City Council, are elected by the votes of the entire city

electorate. The other members are the Borough Presidents of New York City's five boroughs: the Bronx, Brooklyn, Manhattan, Queens and Richmond (Staten Island). The Borough Presidents are elected only by the voters of their respective boroughs.

The boroughs of New York vary greatly in population. According to the 1980 census, Brooklyn, the largest, had a population of approximately 2.2 million, while the population of Staten Island, the smallest, was slightly over 350,000. Appellants claim that the system by which voters of geographical units of substantially different populations send the same number of representatives to the Board violates the Equal Protection Clause of the Fourteenth Amendment. Appellants, residents and voters of Brooklyn, contend that as a result of the present voting scheme, voters in

Staten Island have six times the voting strength of Brooklyn voters.

In the district court, the principal parties cross-moved for summary judgment on agreed facts. Summary judgment was opposed by Frank Ponterio, a resident and voter of Staten Island, who had been permitted to intervene. The court granted appellees' motion for summary judgment, concluding that the Board is neither an elective nor a legislative body, and that, accordingly, under Avery v. Midland County, 390 U.S. 474 (1968), and Sailors v. Board of Education, 387 U.S. 105 (1967), the constitutional principle of one person, one vote was inapplicable.

The district court determined that the Board is not an elective body because no independent election is held to select the Board's members; rather, the Board "consists of a group of public officials who

are already constitutionally elected to their respective offices as required by law." In addition, the district court, in reliance on Sailors v. Board of Education, supra, determined that the Board's primarily non-legislative character removed it from the reach of the Equal Protection Clause.

Appellants challenge the district court's conclusion that the Board is not an elected body, arguing that because the members of the Board become Board members as a matter of law upon election, they are in fact and law "elected" to their respective positions. They further contend that the proper question is not whether the Board executes legislative tasks, but whether it exercises general governmental functions. Finally, appellants argue that the voting disparities created by the present electoral scheme are far greater than permissible under the Equal Protection Clause and such cases as Abate

v. Mundt, 403 U.S. 182 (1971) and Mahan v. Howell, 410 U.S. 315 (1973).

Appellees contend that the Board members sit on the Board "ex officio" and accordingly are not elected to the Board itself. They argue further that this Court should defer to the decision of the New York Court of Appeals in Bergerman v. Lindsay, 25 N.Y.2d 405, 306 N.Y.S.2d 898 (1969), appeal dismissed and cert. denied, 398 U.S. 955 (1970), which upheld the constitutionality of the Board's electoral scheme as it was at the time. Finally, appellees urge that the unique nature of the Board presents the type of "special circumstances" that the Supreme Court has indicated may justify "departures from strict equality" of the one person, one vote rule under Abate v. Mundt, 403 U.S. 182 (1971).

Intervenor-Appellee Ponterio defends the district court's grant of summary

judgment and further contends that if the one person, one vote rule applies to the Board, substantial questions of fact are presented as to whether the present scheme in fact results in disproportionate voting power as between voters of different boroughs, and, if so, to what extent.

I.

In Hadley v. Junior College District, 397 U.S. 50, 56 (1970), the Supreme Court held "that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election ..." Accordingly, our primary task is to determine whether the Board of Estimate is selected "by popular election"

and whether it performs "governmental functions."

In finding the Board to be an appointed body, the district court relied primarily on Sailors v. Board of Education, 387 U.S. 105 (1967), in which the Supreme Court held the one person, one vote standard inapplicable to a county school board which was selected by a process described as "basically appointive rather than elective." Id. at 109. In Sailors, voters in local districts elected local school boards. Each local board then sent a delegate to a biennial meeting at which the county board was elected. As the Court explained: "there is not even a formal method by which a delegate [from a local school board] can determine the preferences of the people in his district. It is evident, therefore, that the membership of the county board is not determined, directly or indirectly, through an election in which

the residents of the county participate." Id. at 110 n.6.

Unlike the county school board members in Sailors, the members of the Board of Estimate are directly elected by the voters. Upon election to their respective positions, they automatically become Board members as a matter of law. Section 61 of the City Charter specifies:

> "The mayor, the comptroller, the president of the council and the presidents of the boroughs shall constitute the board of estimate."

(emphasis added)

It follows that the Board of Estimate is not an appointed body; its membership is definitively determined by election and by election alone.

Moreover, the question of the applicability of the Equal Protection Clause to "ex officio" boards was settled in this Circuit in Bianchi v. Griffing, 393 F.2d 457

(2d Cir. 1968). In Bianchi, we held the one person, one vote principle applicable to a county board of supervisors selected in a manner virtually indistinguishable from the process by which the Board of Estimate is chosen. The board at issue in Bianchi consisted of elected town supervisors who served on the county board as "delegates" of their towns. The language used in rejecting the appellee's argument in Bianchi describes the situation presented here:

> "The mere fact that board members may be characterized as 'delegates' and perform functions in addition to their duties on the board, does not provide a meaningful distinction ... We are impelled to the realistic recognition that a citizen entering the voting booth chooses at one and the same time a member of the Board of Supervisors and his town supervisor."

Id. at 461. Similarly, a citizen entering the voting both in New York City "chooses at one and the same time" his Borough

President and his Board of Estimate member. See also Rosenthal v. Board of Education, 497 F.2d 726, 729 (2d Cir. 1974) ("Had election as a member of a local board served automatically to designate that elected member also as a member of a central high school board, the 'one man, one vote' concept would have been offended") (emphasis added).

Accordingly, we conclude that the Board of Estimate is selected by popular election.

II

The question whether the Board of Estimate exercises "general" governmental functions which have "sufficient impact throughout the district," Hadley, supra, at 54, is answered by a review of the Board's duties. The Board, acting alone, must approve every lease, every franchise, and, indeed, every contract entered by the city

of New York. It sets tax abatements, approves and modifies all zoning decisions, and determines the use, development and improvement of property owned by the city. In view of these powers, as well as the Board's substantial role in passing on the city's budget, it appears beyond dispute that the Board exercises extensive control over the land and resources of New York City.

Whether the Board's role is more "administrative" than "legislative" is not controlling: while the distinction was at one time considered significant by the courts, and indeed was a focal point of the New York Court of Appeals decision upholding the validity of the Board of Estimate in Bergerman v. Lindsay, supra,[2] it was conclusively abandoned by the Supreme Court in Hadley:

> "It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts, Avery [v. Midland County, 390 U.S. 474, 482 (1968))]'"

Id. at 55-6.

Accordingly, we conclude that the Board of Estimate is selected by popular election and performs general governmental functions. The principle of one person, one vote is therefore applicable.

III.

Because the district court found the one person, one vote rule inapplicable, no findings were made concerning the level of malapportionment, the weight of the state interests alleged to justify whatever level of deviation exists or whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates

a system of representation that satisfies constitutional standards for instruments of local government. It is therefore proper to remand the case to the district court so that it can make such findings.

Upon remand, the district court must determine the degree of malapportionment present (after deciding on the appropriate methodology for doing so)[3] and rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula.

"Mathematical exactness or precision is hardly a workable constitutional requirement," Reynolds v. Sims, 377 U.S. 533, 577 (1964), and this is "particularly true for state and local bodies, where more flexibility is constitutionally permissible due to the interest in the normal functioning of these institutions," Baker v. Regional High School District No. 5, 476 F. Supp. 319, 323

(D. Conn. 1979). The district court may find it desirable to amplify the record with regard to "the particular circumstances and needs of [the] local community as a whole [which] may sometimes justify departures from strict equality." Abate v. Mundt, 403 U.S. 182, 18[5] (1971).

Two brief comments as to arguments of intervenor-appellee Ponterio are in order. First, Ponterio attempts to demonstrate statistically that even if the votes of Brooklynites are diluted under the present arrangement, the Board's structure and composition is such that it cannot be controlled by representatives of a minority of the population. That point, however, worthwhile, is not dispositive: a plaintiff in a malapportionment case is not required to prove that the challenged body is controlled by representatives of a minority of the population. The question is not whether

Staten Island "dominates" the Board of Estimate, but whether "the guarantee of equal voting strength for each voter [which] applies in all elections of governmental officials," Hadley, supra, at 58, is violated by the present electoral scheme.

Second, Ponterio purports to prove that under a proportional voting scheme adjusted to equalize the disparities complained of by appellants, Staten Island's voters would be "effectively disenfranchised" because Staten Island's vote would rarely be decisive. As an initial matter, we question whether such a proposition is capable of being proven in a reliable manner: whether a minority representative is "effectively disenfranchised" or whether it becomes the "kingmaker" that regularly breaks ties between the major coalitions depends on which coalitions most often occur in practice, a matter which appears unpredictable except

perhaps for the short run. However, questions of proof are for the district court. More importantly, the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy. Whether the present allocation of seats on the Board is a constitutionally permissible way of blending majority control with minority representation and other legitimate needs of local government is one issue to be examined on remand.

Nothing said above is intended to indicate a view as to the proper or preferable means of constituting the Board or whether it is presently properly constituted. In connection with the present structure of the Board it is important to recognize that the Supreme Court has repeatedly endorsed innovative approaches to

local government, devised by local officials to meet local needs. "[T]he Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government," Avery v. Midland County, 390 U.S. 474, 485 (1968). So long as the requirements of the Equal Protection Clause are met, each locality is free to develop the system of governance which best accords with its needs.

For the reasons stated above, the decision of the district court is reversed and remanded.

FOOTNOTES

[1] The powers of the Board are set forth in the New York City Charter, see especially §§ 67, 120, 121, 200, 202, 222, 223, 224, 229, 230, 343, 362, 363, 372, 384; the New York City Administrative Code; and sundry provisions of State law, see e.g., N.Y. Gen. Mun. Law § 126 (McKinney 1977).

[2] The New York Court of Appeals held that the one person, one vote rule was not applicable to the Board of Estimate because the Board exercised neither legislative nor general governmental powers. Bergerman v. Lindsay, 25 N.Y.2d 405, 306 N.Y.S.2d 898 (1969), appeal dismissed and cert. denied, 398 U.S. 955 (1970). However, the Bergerman case was decided without the benefit of the Supreme Court's ruling in Hadley, supra, decided shortly thereafter, which we believe dictates a different result. Moreover, subsequent to the Bergerman

decision, the law governing the Board's voting rules was altered by the 1975 New York City Charter Amendments to eliminate the Mayor's votes in the budget adoption process so that today it is theoretically possible for the votes of Board members representing a minority of the population to control the outcome on budget matters.

[3] For example, the fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative.

MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK
Dated December 1, 1982
81 CV 3920 (ERN)

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs,

-against-

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as City Council president, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough presidents of the boroughs of the City of New York,

Defendants,

and

FRANK V. PONTERIO,

Intervenor-Defendant.

APPEARANCES:

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By JUDITH A. LEVITT, ESQ.
SUSAN R. ROSENBERG, ESQ.

FRANK V. PONTERIO, ESQ.
Intervenor-Defendant Pro Se

NEAHER, District Judge.

This action raises again the question of the application of the "one person, one vote" principle of the Fourteenth Amendment to an agency of local government.[1] Plaintiffs are three registered voters of the Borough of Brooklyn who seek declaratory and injunctive relief to remedy claimed disproportionate representation of their borough on the Board of Estimate of the City of New York. This Court's jurisdiction over the action is not in controversy; indeed, the defendants join plaintiffs in seeking a disposition by summary judgment on the basis of an agreed

statement of facts not in dispute, and both sides have served motions accordingly.

The defendants in the action are the City of New York, the Board of Estimate (hereinafter "Board") and its eight constituent members, namely, the Mayor, the Comptroller the President of the City Council and the five Borough presidents.[2] These officials are not elected to the Board. Rather, they function as members of the Board by virtue of their prior election to the City governmental offices they hold. Essentially, the controversy between the parties focuses solely upon the allocation of one vote to each of the five borough presidents for purposes of deciding matters over which the Board has jurisdiction. Plaintiffs contend in general that such an equal distribution of voting power is an unconstitutional dilution of the voting rights of Brooklyn residents who substantially

outnumber the populations of the four other boroughs, especially the considerably less populous Borough of Richmond (Staten Island). Defendants, however, raise a more fundamental question: whether the Board, as a unique instrumentality of local government, is subject to the "one person, one vote" rule. For the reasons hereinafter discussed, we hold that it is not and thus the "one person, one vote" rule has no relevance to the Board's functions.

The following relevant facts are not in dispute. The Board is an agency[3] of New York City municipal government authorized by Chapter 3 of the New York City Charter. The current City Charter, except as amended in 1975, became effective January 1, 1963 following approval by the City's voters. The Board, however, has had a long and varied history dating back to 1864, when it was originally created for the

purpose of estimating the expense of conducting a metropolitan police district for the then separate cities of New York and Brooklyn. Its original members were the Commissioners of the Metropolitan Police (appointed by the Governor) and the Comptrollers of New York and Brooklyn (chosen by the respective Common Councils of those cities).[4]

As already indicated, the Board of Estimate is now comprised of three city-wide officials, i.e., the mayor, the comptroller, the city council president and the five borough presidents. Ch. §61[5] The city-wide officials are, of course, elected to their respective offices by majority vote of the City's entire voting electorate. Each borough president is elected only by the voters residing in his borough and is allotted one vote on the Board. The city-wide officials on the Board have two

votes each for a total of six, which constitutes a majority except when the mayor's two votes are eliminated in the budget formulation and adoption process. Ch. §62.

To carry out its responsibilities, the Board is required to meet at least once every other week except during July and August. Ch. §63. The mayor, or in his absence the president of the city council, presides at all meetings. Id.[6] Unless otherwise provided in the Charter or by law, the Board must act by resolution adopted by a majority of the eleven votes authorized to be cast by all its members, except that a three-fourths vote is required to adopt a resolution or amendment thereof which is originally presented at a Board meeting. Moreover, such a resolution or amendment may not be finally passed except at a meeting open to the public. Ch. §62b, c.

By unanimous vote the Board may delegate to any member or committee the power to act or hold hearings on any matter within its jurisdiction, excluding, however, matters included in the formulation and adoption of the expense and capital budgets, city planning and the granting of franchises as set forth in Chapters 6, 8, 9 and 14 of the Charter. Ch.§65.

The responsibilities, powers and duties of the Board are set forth in the Charter, the New York City Administrative Code and sundry provisions of State law. Section 67 of the Charter provides that:

> "The board shall exercise the powers and perform the duties imposed upon it by this charter, and shall:
>
> "1. Grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use.
>
> "2. Make recommendations to the mayor or the council in regard

to matters of city policy whenever requested or on its own initiative.

"3. Hold public hearings on any such matter of city policy or other matters within the scope of its responsibilities whenever requested by the mayor or required to do so by this charter or other provisions of law or whenever in its judgment the public interest will be benefited thereby.

"4. Have final authority respecting the use, development and improvement of city land.

"5. Have authority to approve standards, scopes and final designs of capital projects.

"6. Have power to supersede a community board or withdraw from a community board delegated powers of such community board for violation of law, malfeasance or misfeasance by three-quarters vote after notice to members of the community board and a public hearing.

"7. Hold a hearing on tax abatement applications relating to the development of city land where the granting of such applications involves the exercise of administrative discretion by any city agency."

In addition Charter chapters 6 and 9 provide a concurrent role for the Board with

that of the city council and the mayor in the formulation and adoption of the City's annual expense and capital projects budgets. It is these provisions which are the core of plaintiffs' claims that the Board is "one house of a bicameral legislature" in which Board members representing only 41.7% of the City's population may "control a majority of votes on every budget measure." Complaint, pars. 8B, 16. Those claims, however, cannot withstand a fair analysis of a City budgetary procedure which is clearly designed to insure that all the City's elected officials, officers of City agencies and representatives of community and borough boards representing all sectors of the City have the opportunity to be heard before an expense or capital budget is finally adopted. Ch. §§119, 221.

It is the mayor, as the City's chief executive officer, Ch. §3, acting through his

appointed director of management and budget, Ch. §111, who initially shapes and proposes the expense budget based upon his views of the City's needs and priorities in light of its revenue resources. Ch. §§112-117. The Board acting jointly with the city council may not reject the proposed budget in toto; but "may increase, decrease, add or omit any unit of appropriation . . . or add, omit or change any terms or conditions of it." Ch. §120. And if the Board and city council cannot agree by June 5th of any year, "the budget and tax rate adopted as modified for the current fiscal year shall be . . . extended for the new fiscal year until such time as a new budget is adopted." Ch.§120c.

Moreover, although the mayor may not vote as a member of the Board when it and the city council are considering his proposed budget, he has the power to veto any

changes they make. Ch. §121. In that event, either the Board by two-thirds vote of all members other than the mayor, or the city-council by two-thirds vote of all its members must act to override his disapproval of any change. If the Board does so, it must be supported by majority vote of all city council members; if the city council acts first, the Board must concur by majority vote without the mayor's two votes. Ch. §121b. Also, during any fiscal year the mayor may transfer one unit of budget appropriation to another without notice to the Board or the city council. Only when a transfer is from one agency to another, or results in a unit of appropriation being increased or decreased by more than 5%, must notice be given to the Board and the city council.[7] Either body may disapprove the proposed action within 30 days. Ch. §124b. The New York Court of Appeals has

held that in such event the mayor may vote as a member of the Board. Golden v. Koch, 49 N.Y.2d 690 (1980).

The formulation and adoption of the City's capital projects budget follows a parallel course, except that the city planning commission, also appointed by the mayor, Ch. §§191-192, advises and assists him, the Board and the city council in planning capital project undertakings. Also the comptroller provides information as to the maximum amount of debt and reserves the City may soundly incur for capital projects and debt financing during the ensuing four fiscal years. Ch. §212. Again both the Board and the city council must agree on any changes to be made in the mayor's proposed executive capital budget; and, if the mayor vetoes such changes, must unite to override any disapproval in the same

manner as provided for the expense budget. Ch. §223c.

It can readily be seen from the foregoing Charter provisions that the borough presidents on the Board cannot control the City's budgetary process, as plaintiffs contend. First, the Board alone cannot adopt a budget; the city council's separate concurrent vote is required. Ch. §120b. Second, the Board cannot initiate an override of a mayor's veto except by a two-thirds vote excluding the mayor's vote. Ch. §121b. That would require six votes out of nine, which means that the support of the comptroller or the city council president, or both, is essential. Only if the city council initiated an override by two-thirds vote of its members is it possible for the Board to concur by a majority of five votes. And if the two bodies fail to agree, the expense budget as modified by the mayor is

adopted. Id. As already indicated, parallel provisions apply with similar effect in the case of the capital projects budget. Ch. §§222, 223.

The critical flaw in plaintiffs' argument is their misconception of the ruling and principles enunciated in Avery v. Midland County, 390 U.S. 474 (1968), on which they heavily rely. The question before the Court in that case was "whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population." Id. at 478, emphasis supplied. Answering that question in the affirmative, the Court stated the underlying principle that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." Id. at 485. The

Commissioners Court of Midland County in Avery was in fact the County's elected governing body whose members represented districts of widely disparate population, except for the county judge, who was elected at large. The Board, however, is not an elected body: it consists of a group of public officials who are already constitutionally elected to their respective offices as required by law. Ch. §4 (election of mayor); Ch. §81 (election of borough presidents); Ch. §91 (election of comptroller). No provision is made in the Charter for the election of a board of estimate. Membership and participation in the assigned activities of the Board is simply a part of the prescribed duties of the respective offices to which the designated officials were already elected. Ch. §§61-68. The members of the Board are, in effect, appointed by local law.

Prior to its decision in Avery, supra, the Supreme Court had already found no reason why local government officials of a "nonlegislative character" could not be chosen by "some other appointive means rather than by election." Sailors v. Board of Education, 387 U.S. 105, 108 (1967). In Sailors, the Court rejected a constitutional challenge to the biennial selection of county school board members by delegates chosen by local school boards whose members had been elected by the people. Noting again that "[w]e see nothing in the constitution to prevent experimentation," the Court held that "[s]ince the choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of 'one man, one vote' has no relevancy." Id. at 111.

Plaintiffs seek to clothe the Board with a legislative character by contending that it "maintains legislative functions which are implemented on a day-to-day basis," while conceding that it is not "formally denominated a city legislature." Pl. Mem. at 10. The Charter makes it clear, however, that it is the city council which is "vested with the legislative power of the city, and shall be the local legislative body of the city." Ch. §21. It is the city council elected by the voters, not the Board, which is charged with the responsibility of enacting the local laws that govern the City. Ch. §27. Noteworthy also is the provision that the city council president -- a member of the Board -- has no vote in council deliberations except to break a tie. Ch. §23d. Moreover, as previously pointed out, to the extent that the Board has a role with the city council in the budget-making process

which may be regarded as legislative in nature, the Board's powers "are at once closely conditioned and highly contingent on the action of other city agencies, executive and legislative. The Board is itself unable alone to make or revoke a budget with finality or to add or delete an item in a budget beyond the reach of further change by others." Bergerman v. Lindsay, 25 N.Y.2d 405, 409 (1969). The subsequent elimination in 1975 of the mayor's votes on the Board in the budget formulation and adoption process clearly does not undermine the Bergerman Court's findings or permit representatives of a minority of the City's population to adopt a budget, as plaintiffs contend. Pl. Mem. 10, 35.

To conclude, plaintiffs' attempt to draw an analogy between the Board and the local governing bodies before the Court in Avery, supra, in Hadley v. Junior College District,

397 U.S. 50 (1970), and in Abate v. Mundt, 403 U.S. 182 (1971), ignores the critical element in each case, namely, the malapportionment of an elected governing body. That is not the case here, since the Board per se is not an elected body.

As the New York Court of Appeals has pointed out, "the chartered plan of government for the City of New York has but two branches -- executive and legislative -- the functions of which, as defined by the legislature, are not always independent. This comes about . . . from the fact that a city is not sovereign, as are the federal government and the States," but is simply an agency of the State. LaGuardia v. Smith, 288 N.Y. 1, 7 (1942). The mayor, as the chief executive officer of the City, in addition to his power to appoint and remove all city officials not elected by the people, exercises "all the powers vested in the city,

except as otherwise provided by law." Ch. §§3, 6, 8. The city council, as already noted, is "vested with the legislative power of the city . . . ." Ch. §21. The role and power of a borough president, on the other hand, is considerably more limited. Aside from appointing or removing a deputy, an executive assistant and subordinate employees, a borough president is limited to maintaining a topographical bureau, chairing a borough board, holding public hearings on matters of public interest, and making recommendations to the mayor and other city officials on capital projects and in the interest of the people of his borough. Ch. §§82, 85.

Where then does the Board fit into City government? It is in large measure, to quote the Kramarsky Report, supra,

> "a forum in which the most powerful elected officials representing different parts of the

> city can meet and represent the interests of their particular groups, as well as the City as a whole . . . . Id. at p. 5.

But the Board is more than a forum, for as the same report shows, the Board performs a wide variety of executive and administrative functions in respect of the use of property of, or for the City; the authorization and/or approval of public improvements; the disposal of City property; city planning and zoning; contracts and franchises; budgetary and financial matters; and a miscellany of minor matters. Kramarsky Report, Appendix A, at 122 et seq. None of these, however, is legislative in nature except for the Board's limited role in the annual budget process, which cannot be decisive without the concurrent support of the city council. More important, if there were no Board, these functions would very likely have to be performed by the same

elected officials who constitute the Board, and who indeed now make its decisions.

Since in our view the Board does not fall within the purview of the "one person, one vote" rule, plaintiffs' motion for summary judgment must be denied and defendants' motion granted.

SO ORDERED.

The Clerk of Court is directed to enter judgment dismissing the complaint. The Clerk is further directed to forward copies of this Memorandum and Order to counsel for the parties.

_____
U.S.D.J.

Dated: Brooklyn, New York
December 1, 1982

RELEVANT PROVISIONS OF THE NEW YORK CITY CHARTER PERTAINING TO THE POWERS AND DUTIES OF THE N.Y.C. BOARD OF ESTIMATE

Section 67. **Responsibilities of the board.** The board shall exercise the powers and perform the duties imposed upon it by this charter, and shall:

1. Grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use.

2. Make recommendations to the mayor or the council in regard to matters of city policy whenever requested or on its own initiative.

3. Hold public hearings on any such matter of city policy or other matters within the scope of its responsibilities whenever requested by the mayor or required to do so by this charter or other provision of law or whenever in its judgment the public interest will be benefited thereby.

4. Have final authority respecting the use, development and improvement of city land.

5. Have authority to approve standards, scopes and final designs of capital projects.

6. Have power to supersede a community board or withdraw from a community board delegated powers of such community board for violation of law, malfeasance or misfeasance by three-quarters vote after notice to members of the community board and a public hearing.

7. Hold a hearing on tax abatement applications relating to the development of city land where the granting of such applications involves the exercise of administrative discretion by any city agency.

Section 116. **Submission of the budget.** Not later than the twenty-sixth day of April the mayor simultaneously shall submit to the board of estimate and the council (1) a proposed budget for the ensuing fiscal year, and (2) a budget message, both of which shall be public records and shall be printed forthwith.

Section 119. **Budget hearings.** Between the sixth day of May and the twenty-fifth day of May in each year, the board of estimate and the council shall hold public hearings on the budget as presented by the mayor. The council may hold such hearing either as a body or by its finance committee or other committees. The hearings may be held jointly by consent of both bodies. Officers of agencies and representatives of community boards and borough boards shall have the right, and it shall be their duty when requested by the board of estimate or the council, to appear and be heard.

Section 120. **The budget; approval.**

a. The board of estimate and the council may increase, decrease, add or omit any unit of appropriation in the budget as submitted by the mayor, or add, omit or change any terms or conditions of it.

b. Except as otherwise provided by law, and subject to the veto of the mayor pursuant to section one hundred twenty-one, the board of estimate and the council, by separate concurrent vote of each body, shall adopt a single budget, and it shall be returned to the mayor not later than the fifth day of June. In the event of a disagreement between the two bodies, each shall appoint members to a conference committee to reconcile differences and to make recommendations to the respective bodies for concurrent vote of each body.

c. If a single budget has not been adopted by the fifth day of June pursuant to subdivision b of this section, the budget and tax rate adopted as modified for the current fiscal year shall be deemed to have been extended for the new fiscal year until such time as a new budget is adopted.

d. The mayor shall not participate in any action or vote of the board of estimate on the budget.

e. The actions and votes of the board of estimate and the council shall be certified to the mayor by the secretary of the board of estimate and the president of the council, respectively.

Section 121. **Veto of the mayor.**

a. The mayor, not later than the tenth day of June, may disapprove any increase or addition to the budget any unit of appropriation, or any change in any term or condition of the budget. The mayor shall return the budget by that date to the board of estimate and council, setting forth his objections in writing.

b. Either the board of estimate by a two-thirds vote of all the members of the board other than the mayor, or the council, by a two-thirds vote of all the council members, may override any disapproval by the mayor pursuant to subdivision a of this section, with the concurrence of the other body by a majority vote of all members other than the mayor in the case of the board of estimate. The board of estimate and the council shall act and the expense budget shall be adopted not later than the twentieth day of June. In the event the board of estimate and the council fail to act by that date, the expense budget as modified by the disapprovals by the mayor is adopted.

Section 124. **Budget modification.**

a. Subject to the quarterly spending allotments and aggregate position and salary limits

established pursuant to section one hundred twenty-three, and to other applicable provisions of this charter, of the civil service law and of other law, changes in schedules, within units of appropriation, may be made by the head of each agency. Any such changes shall be published in the City Record and copies shall be forwarded to the mayor and the comptroller not less than ten days before the effective date thereof.

b. The mayor during any fiscal year may transfer part or all of any unit of appropriation to another unit of appropriation, except that when any such transfer (1) shall be from one agency to another or (2) shall result in any unit of appropriation having been increased or decreased by more than five per cent from the budget as adopted for such unit of appropriation, the mayor shall notify the board of estimate and the council of the proposed action. Within thirty days after the first stated meeting of each body following the receipt of such notice, either the board of estimate or the council may disapprove the proposed action. Written notice of any transfer pursuant to this subdivision shall be given to the comptroller and shall be published in the City Record as soon as possible after such transfer.

c. The provisions of this section shall not be deemed to authorize any transfer from appropriations required by law.

d. As used in this section, the term "unit of appropriation" shall mean and include (1) a unit of appropriation for personal service as defined in subdivision b of section one hundred twelve of the charter together with that portion of a unit of appropriation for other than personal service, as defined in subdivision c of such section one hundred twelve, which is allocated to such unit of appropriation for personal service; or (2) a unit of appropriation for other than personal service as defined in subdivision c of such section one hundred twelve.

e. The council may during any fiscal year transfer part or all of any unit of appropriation within the council appropriation to any other council unit of appropriation for any of its programs or projects or for any other purpose, solely by adoption of a council resolution. Each such transfer shall be published in the City Record and written notice thereof shall be given to the mayor and to the comptroller not less than ten days before the effective date thereof.

f. The procedures and required approvals pursuant to sections one hundred twenty, one hundred twenty-one and one hundred twenty-two, without regard to the dates specified therein, shall be followed in the case of (1) any proposed amendment to the budget respecting the creation of new units of appropriation, or (2) the appropriation of new revenues from any source, or (3) the proposed use by the city of previously unappropriated funds received from any source. Any request by the mayor respecting an amendment to the budget that involves an increase in the budget shall be accompanied by a statement of the source of current revenues or other identifiable and currently available funds required for the payment of such additional amounts.

Section 219. **Executive capital budget.**

a. Not later than the twenty-sixth day of April in each year, the mayor shall submit to the board of estimate and to the council with an explanatory message, a proposed executive capital budget for the ensuing fiscal year, the aggregate amount of which shall not exceed the amount in the mayor's certificate, and a proposed executive capital program for the three succeeding fiscal years.

. . .

Section 220. Recommendations of comptroller and city planning commission. Not later than the

sixth day of May, the comptroller and the city planning commission shall submit to the board of estimate and to the council reports, which shall be published forthwith in the City Record, containing such comments and recommendations with respect to the proposed executive capital budget and capital program as they may deem advisable.

Section 221. **Executive capital budget; hearings.** Between the sixth day of May and the twenty-fifth day of May in each year, the board of estimate and the council shall hold public hearings on the proposed executive capital budget and executive capital program. The council may hold hearings as a body or by its finance committee or other committees. Such hearings may be held jointly by consent of both bodies. Officers of agencies and representatives of community boards and borough boards shall have the right, and it shall be their duty when requested by the board of estimate or the council, to appear and be heard.

Section 222. **Capital budget; adoption.**

a. The board of estimate and the council, by separate concurrent vote of each body, may increase, decrease or omit the amount of the appropriation for any capital project in the proposed executive capital budget or executive capital program, or add any new capital project to such proposed budget or program or add, omit, or change any term or condition of such proposed budget or program. Except as otherwise provided by law, and subject to the veto of the mayor pursuant to section two hundred twenty-three, the board of estimate and the council, by separate concurrent vote of each body, shall adopt a single capital budget and a single capital program, and they shall be returned to the mayor not later than the fifth day of June. In the event of a disagreement between

the two bodies, each shall appoint members to a conference committee to reconcile differences and make recommendations to the respective bodies.

b. If a single capital budget and a single capital program have not been adopted by the fifth day of June pursuant to subdivision a of this section, they shall be deemed adopted so far as acted on by both bodies with the lower amount of any item in dispute between the two bodies in effect.

c. The mayor shall not participate in any action or vote of the board of estimate on the executive capital budget or in any action or vote on the executive capital program.

Section 223. **Veto of the mayor.**

a. Any action by the council on a capital project or on the terms and conditions of the capital budget shall be certified to the mayor by the president of the council. Any action by the board of estimate on a capital project or on the terms and conditions of the capital budget shall be certified to the mayor by the secretary of the board of estimate.

b. The mayor, not later than the tenth day of June, may disapprove any increase or addition to the executive capital budget or executive capital program or any increase or addition to any capital project in the executive capital budget or executive capital program, or any change in term or condition of the executive capital budget or executive capital program. The mayor shall return the capital budget and capital program by that date to the board of estimate and council, setting forth his objections in writing.

c. Either the board of estimate by a two-thirds vote of all the members of the board other than the mayor, or the council by a two-thirds vote of all the council members, may override any disapproval by the mayor pursuant to subdivision b of this section with the concurrence of the other body by a majority vote

of all members other than the mayor in the case of the board of estimate.

Section 224. **Amendment**.

a. Upon receipt of a recommendation in writing from the mayor, the board of estimate and the council may amend the capital budget or capital program in the same manner as the adoption of the capital budget and capital program including the right to approve the proposed amendment as submitted or to increase or decrease the amounts of funds proposed to be appropriated thereby, but only if funds are available within the capital budget and the applicable program category of the capital program.

b. Upon the adoption of any such amendment by the board of estimate and by the council, it shall be certified by the mayor, the secretary of the board of estimate, the president of the council and the city clerk and the capital budget shall be amended accordingly.

c. Not later than five days after such certification such amendment shall be filed in the office of the comptroller and shall be published forthwith in the City Record.

Provisions Relating to Contracts:

Section 343. **Public letting**.

a. If the several parts of the work, labor or the supplies, materials and equipment to be done or furnished shall together involve the expenditure of more than five thousand dollars, or in the case of construction, repair, rehabilitation or alteration, the expenditure of more than fifteen thousand dollars, such work or labor or supplies, materials, and equipment or construction, repair, rehabilitation or alteration shall be obtained only by contract on public letting founded on sealed bids under such regulations as shall be made by the board of

estimate, except that in a special case the board of estimate by a two-thirds vote may order otherwise. The terms of such contracts shall be settled by the corporation counsel as an act of preliminary specification to a proposal for bids.

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Section 349. **Consultant contracts.**

a. Except as otherwise provided by resolution of the board of estimate, no contract for the performance of technical, consultant or person services for which competitive bidding is inappropriate, involving the expenditure of more than ten thousand dollars shall be awarded except after public hearing before and approval by a majority of the board of estimate.

b. Within ten days after the award of any contract for technical, consultant or personal services, notice thereof shall be published in the City Record.

c. This section shall not be applicable to contracts with planners, architects, engineers, or any other person or firm if such person or firm and their estimated fees have been identified in a scope of project approved by the board of estimate pursuant to chapter nine.

d. All mayoral and non-mayoral agencies required to submit contracts to the board of estimate for approval pursuant to this section shall have guidelines setting forth their procedures regarding the use, oversight and reporting of contracts and selection of contractors for consultant, technical and personal services which require approval pursuant to this section. Such guidelines shall include the following matters:

. . .

Provisions Relating to Franchises:

Section 361. **Definition.** The term "streets of the city" as used in this chapter shall include

streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and public grounds of waters within or belonging to the city.

Section 362. **Powers of board of estimate.** The board of estimate shall have the control of the streets of the city, except as in this charter otherwise provided, and shall have the exclusive power in behalf of the city to grant franchises or rights or make contracts providing for or involving the occupation or use of any of the streets of the city, whether on, under or over the surface thereof, for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power, or the installation of transformer vaults, and to give the consent of the city to any franchise or right of any kind or nature whatsoever for or relating to the occupation or use of the streets of the city under the provisions of the constitution or of any statute.

Section 372. **Requisite vote of board of estimate for approval of resolution.** No such resolution shall take effect unless carried by a three-fourths vote, and the vote shall be shown by ayes and noes as recorded in the minutes of the board.

Section 373. **Powers of the mayor.**

a. The separate and additional approval of the mayor shall be necessary to the validity of every such resolution.

b. Every such resolution shall before it takes effect be presented, duly certified, to the mayor for his approval. Such contract or resolution shall not be effective unless such resolution shall be approved by the mayor within sixty days after it is presented to him, or within

such further time not exceeding sixty days additional as may be authorized by the board of estimate.

Provisions Relating to City Property

Section 384. **Disposal of Property of the city.**

a. No real property of the city may be sold, leased, exchanged or otherwise disposed of except with the approval of the board of estimate and as may be provided by law unless such power is expressly vested by law in another agency.

b. Except as otherwise specifically provided by law:

1. The board of estimate may authorize the sale or lease only for the highest marketable price or rental, at public auction or by sealed bids and after advertisement for at least thirty days in the City Record, of any real property belonging to the city or any interest therein, and no such lease shall run for a term longer than ninety-nine years. Any conveyance or lease may provide for the restriction of the use of such real property to purposes determined by the board of estimate.

. . . .

4. Notwithstanding the provisions of this charter, or any general, special, or local law to the contrary, the board of estimate may, with the approval of a majority of the members of the borough board of the borough in which such real property is located, lease any real property of the city, except inalienable property or any interest therein, to a local development corporation without competitive bidding and for such purpose or purposes and at such rental as may be determined by the board of estimate to be in the public interest, and no such lease shall run for a term longer than ninety-nine years.

5. Review by a community board or borough board of any proposal or application for the sale, lease (other than lease of office space), exchange or other disposition of city property or of property for the use of the city shall be in the manner specified pursuant to section one hundred ninety-seven-c. Such review shall be limited to the land use impact and implications of the proposed transaction.

(a) A community board may waive the conduct of a public hearing and the preparation of a written recommendation with respect to any proposed lease of property which in the judgment of the board does not involve a substantial land use interest.

(b) The city planning commission may waive a public hearing on any proposal or application involving a lease of property.

6. The city planning commission shall act on any proposed lease of property of or for the city within sixty days of filing with it of the recommendation of a community board or borough board, or the latest filing if there is more than one filing within the time allowed under section one hundred ninety-seven-c. The commission may waive a public hearing on any proposal or application involving a lease of property.